IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.103 OF 2006

Essar Shipping Ltd. ..Petitioner.

Vs.

Great Eastern Shipping
Co. Pvt. Ltd. ..Respondent.

Mr.P.S. Pratap for the Petitioner.

Mr.Sunip Sen with Mr.Amitava Majumdar with Mr.Shiv Kumar Ganesh i/b. M/s.Bose & Mitra & Co. for the Respondent.

CORAM : S.J. VAZIFDAR, J.
DATED : 13TH JUNE, 2006

P.C. :

This is a petition under section 34 of The Arbitration Act, 1940, challenging an award of the arbitral tribunal, consisting of two arbitrators. The award directs the Petitioner to pay the Respondent a sum of Rs.12,89,961.68 with interest at 10% per annum from 14.10.1994 till payment.

2. The disputes between the parties arise under a time charter dated 3.2.1994. The Respondent had charted its vessel to the Petitioner. The present petition is concerned only with the price of fuel re-delivered by the charterer/Petitioner at the end of the period of charter. Clauses 3 and 33 of the

time charter are relevant in this regard as reads as under :

> "3. That the Charterers, at the port of delivery, and the Owners, at the port of re-delivery, shall take over and pay for all fuel remaining on board the vessel."
>
> "33. Bunker quantity on delivery to be as on board which estimated to be about 195 MT Fuel Oil and about 55 MT Diesel Oil. Bunker quantities on redelivery to be same as on delivery.
>
> Charterers to pay for bunkers on board alongwith first charter hire, at the I.O.C. Coastal prices prevailing on the date of delivery at Madras. The same prices will be applicable at the time of Redelivery. The USD/Rupees conversion rate is applicable as per Clause 5."

3. On delivery of the vessel, 195 MT of Fuel Oil and 47.9 MT of Diesel Oil were supplied. Upon re-delivery, the quantities of Fuel Oil and Diesel Oil were 352 MT and 151.334 MT respectively. As recorded in the award, upon being advised that the quantity of bunkers at the time of re-delivery was in excess of the quantity at the time of delivery, the Respondent by its fax dated 11.10.1994 informed the Petitioner that they would pay for the excess

quantities only at the bunker prices agreed between the Respondent and the next charterer viz. Vikram Ispat Ltd. The prices agreed between the Respondent and Vikram Ispat Ltd. were US$ 80 PMT for Fuel Oil and US$ 170 PMT for Diesel Oil. It is important to note that the Respondent also advised the Petitioner that if they did not agree to these rates, they could take back the excess quantities and, re-deliver the vessel to the claimant with the same quantities as stipulated in the contract.

4. Admittedly, the Petitioner did not take back the fuel and, instead, re-delivered the vessel with the excess fuel.

5. The Petitioner, upon re-delivery of the vessel, deducted various amounts from the balance hire charges. The disputed deductions which are the subject matter of the present proceedings, pertained to the price of the excess fuel. According to the Petitioner, it was entitled to deduct the price at the market rate. Further, according to the Petitioner, the market rate was the same as the rate at which it paid for the fuel under the time charter. According to the Respondent, it was not liable to pay for the fuel at the said rate but at

the rate at which it supplied the fuel under the time charter, entered into by it with Vikram Ispat Ltd.

6. The Respondent invoked the arbitration clause to recover the deduction relating to the fuel oil. The learned Arbitrators held that any understanding or agreement between the Respondent and the third party cannot be unilaterally imposed on the Petitioner; that the Respondent knew at the time of delivery of the vessel that it would be carrying excess bunkers and yet agreed to lower bunker prices with the next charterers; and that the Respondent applied a rate/price which was not in conformity with the charter agreement. The Arbitrators held that the price sought to be applied by the Claimant were not relevant and were extraneous to the issue. I will refer to the observations in the award regarding the price at the relevant time, shortly.

7. It is important to note that the learned Arbitrators also came to the conclusion that there was a breach on the part of the Petitioner of the aforesaid clause in respect of the quantity re-delivered. The Arbitrators were obviously referring to the fact that under Clause 33, the

Petitioner was liable to re-deliver the same quantity as they have received upon delivery of the vessel. The Respondent therefore was not really bound to accept the excess delivery. It is in this context that the Arbitrators observed that the Respondent had to take over the excess quantity. The learned Arbitrators came to the conclusion that both the parties were guilty of breach for the reasons mentioned above.

8. The observations of the learned Arbitrators that the rates applied by the Claimants do not conform to the agreement, is ex-facie erroneous. The rate in the charter party pertained only to the quantities which the Respondent was bound to accept viz. the same quantity of Fuel Oil as was supplied to the Petitioner upon delivery of the vessel. This error, however, is detrimental to the interest of the Respondent and not to that of the Petitioner and, therefore, can be of no assistance to the Petitioner.

9. Mr.Pratap placed strong reliance upon the following observations of the learned Arbitrators :

> "Also it is not denied that the

> I.O.C. coastal prices at the time of delivery and re-delivery was same and based on this situation no loss has been suffered by the Claimant by reason of Respondent re-delivering the vessel with excess quantity of bunkers."

He submitted that there is an error of law apparent on the face of the award for the learned Arbitrators have held that the Respondent/Claimant have not suffered any damage by reason of the Petitioner having re-delivered the vessel with excess quantity of bunkers. According to him, in this view of the matter, the learned Arbitrators ought to have rejected the entire claim. In this regard, he challenged the following observations of the learned Arbitrators :

> "In conclusion we therefore find and hold that both parties are equally responsible for creation of this situation and acted rather uncommercial - like. Therefore in the interest of equity and justice it is a fit case where the disputed amount needs to be apportioned between the two parties equally. In other words the Claimants are allowed a sum of Rs.4,83,719.64 only."

10. The submission is not well founded. Mr.Sen submitted that there was no proof of the market

price on the date of the re-delivery. I am in agreement. Merely because the I.O.C. Coastal prices were furnished, it would not establish the market price as on that date. There is nothing to suggest that the I.O.C. Coastal prices were the only prices prevailing in the market at that date. Added to this is the fact that the Arbitrators have observed that there was no worthwhile evidence and no data had been provided to show that the market price of the bunkers at the time of delivery was less than the price agreed in the charter. This latter observation, in fact, indicates that the Arbitrators did not have any evidence of the market price. Indeed, it was for the Petitioner to establish the market price for it is they who have contended the positive as to the market prices prevailing on the date of re-delivery.

11. In the above circumstances, I am unable to say that the view taken by the learned Arbitrators qua the Petitioner is unreasonable or unsustainable. The least that can be said is that it is a possible view, if not the only probable one. It is the Respondent who is aggrieved by the aforesaid observations in any event.

12. In the circumstances, the Petition is dismissed.

13. Mr.Sen states that other than the amounts those pertaining to the disputes referred to above, have been paid. It is agreed that this amount is quantified at Rs.4,83,719.64 together with interest thereon as awarded.

14. Mr.Sen applies for a judgment and decree in terms of the award under Rule 787(5) of the Rules of the High Court of Judicature at Bombay (Original Side). The application is granted. There shall be a decree in terms of the award. The same shall however be executable only to the extent of the unpaid amount viz. Rs.4,83,719.64 together with interest thereon as as awarded.

15. The judgment and order is stayed for a period of eight weeks from today to enable the Petitioner to challenge the same.